

CHARLES C. RAINEY, ESQ.
Nevada Bar No. 10723
crailey@hamricklaw.com
HAMRICK & EVANS LLP
7670 W. Lake Mead Blvd., Ste. 140
Las Vegas, Nevada 89128
+1.702.425.5100 (ph)
+1.818.763.2308 (fax)
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ME2 PRODUCTIONS, INC., a Nevada corporation,)	Case No.: 2:17-cv-00724-JCM-NJK
Plaintiff,)	
vs.)	
MIKIYAS BAYU, ANDRE HURST JR.;)	
LOUIE YANG; JOHN THOMAS;)	
SHERREE RAY; DANIELA)	
GUTIERREZ; RONALD CARNEY;)	
STARLINA FLOWERS; CAROLYN)	
WILBER; MIGUEL PALOMARES;)	
JERMAINE WOOTEN; NENG)	
CHUANG TAN; MARIA GUZMAN,)	
Defendants.)	

PLAINTIFF’S OBJECTION TO MAGISTRATE JUDGE NANCY KOPPE’S
REPORT AND RECOMMENDATIONS
(ORAL ARGUMENT REQUESTED)

Plaintiff ME2 PRODUCTIONS, INC. (“Plaintiff”), by and through its counsel, Charles Rainey, Esq. of HAMRICK & EVANS LLP, hereby OBJECTS to the REPORT AND RECOMMENDATIONS entered by Magistrate Judge Nancy Koppe on June 14, 2017 [Dkt. No. 17] (the “R&R”). In the following points and authorities, Plaintiff argues the following points:

1. The Magistrate incorrectly argues that the majority of courts within the Ninth Circuit have held that joinder of BitTorrent Defendants is improper, when, in

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fact, the current prevailing practice of a majority of Courts within the Ninth Circuit (and throughout the United States) is to allow joinder in BitTorrent cases;

2. The Magistrate relies principally upon the “persuasive authority” of a 2012 case from Arizona – a case that is not only easily distinguishable from the present case, but is, in fact, no longer followed in Arizona; indeed, Arizona openly allows joinder in BitTorrent cases, such as the one at hand;

3. The Magistrate’s assertion that claims against participants in a BitTorrent “swarm” fail to meet the standard of arising out of the same series of transactions or occurrences is circular and logically flawed; and

4. The Magistrate fails to offer any meaningful policy rationale for her decision, which is troubling, given the overwhelming policy favoring joinder.

Make no mistake: severing the Defendants in the manner argued for in the pending R&R would be contrary to the interests of not only the Plaintiff, but also the Court and the Defendants. No one wins. There is no sound policy behind this blanket ban on joinder in BitTorrent cases. This objection is based upon the memorandum of points and authorities attached hereto, any attachments thereto, the pleadings and papers on file, and any arguments to be had at any hearing of this matter. A supporting declaration of Plaintiff’s counsel, Charles C. Rainey (“Rainey Decl.”), is submitted herewith, averring as to certain facts and procedural history related to the above-captioned matter and further declaring the truth and accuracy of Exhibit “A” through “AM,” providing the Court copies of certain unpublished orders, pleadings, dockets, and related papers, referenced in the attached Memorandum of Points and Authorities.

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PLEASE TAKE NOTICE that the legal arguments set forth in the attached memorandum of point and authorities shall apply to all cases involving the Plaintiff that are currently before this Court, including, without limitation, cases 2:17-cv-00724-JCM-NJK; 2:16-cv-02513-JCM-NJK; 2:16-cv-02657-JCM-NJK; 2:16-cv-02662-JCM-NJK; 2:16-cv-02783-JCM-NJK; 2:16-cv-02384-JCM-NJK; 2:16-cv-02788-JCM-NJK; 2:16-cv-02563-JCM-NJK; 2:16-cv-02799-JCM-NJK; 2:17-cv-00121-JCM-NJK; 2:17-cv-00122-JCM-NJK; 2:17-cv-00123-JCM-NJK; 2:16-cv-02660-JCM-NJK; 2:17-cv-00126-JCM-NJK; 2:16-cv-02875-JCM-NJK; 2:17-cv-00665-JCM-NJK; 2:17-cv-00666-JCM-NJK; 2:17-cv-00676-JCM-NJK; 2:17-cv-00722-JCM-NJK; 2:17-cv-00049-JCM-NJK; 2:17-cv-00723-JCM-NJK; 2:17-cv-00124-JCM-NJK; 2:16-cv-02520-JCM-NJK; 2:17-cv-00114-JCM-NJK; and 2:17-cv-00667-JCM-NJK

Respectfully submitted June 27, 2017

HAMRICK & EVANS LLP

/s/ Charles C. Rainey
 CHARLES C. RAINEY, ESQ.
 Nevada Bar No. 10723
 crainey@hamricklaw.com
 7670 W. Lake Mead Blvd., Ste. 140
 Las Vegas, Nevada 89128
 +1.702.425.5100 (ph)
Attorney for Plaintiff

HAMRICK & EVANS LLP

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MEMORANDUM OF POINTS AND AUTHORITES

I. INTRODUCTION

Severing the Defendants from this case, as suggested by Judge Koppe in her pending Report and Recommendations (the R&R), would:

- (i) substantially and needlessly increase the administrative burden and cost imposed on not only the Plaintiff, but also the individual Defendants and the Court;
- (ii) likely increase the final dollar amount of judgment awards entered against individual Defendants;
- (iii) severely diminish the intellectual property rights of the Plaintiff; and
- (iv) ultimately do nothing to further the interests of justice or the law.

Furthermore, to the extent that severing the Defendants may set a precedent that deters future cyber-piracy litigation (*e.g.*, rendering anti-piracy litigation so costly and administratively burdensome that copyright owners refrain from enforcing their rights), the Court would be playing directly into the hands of BitTorrent users, allowing their infringing activities to continue undeterred, while causing substantial damage to the entertainment industry and our economy as a whole. It would essentially serve as an abdication of judicial authority from the Court – a move that would compromise the rule of law and fly in the face of two centuries of jurisprudence. “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 4 U.S. 137, 163 (1803).

Digital piracy, and in particular BitTorrent piracy, costs our economy billions of dollars each year.¹ Meanwhile, despite the ubiquitous presence of lawful streaming sites, like Netflix and Hulu, BitTorrent use is growing.² Plaintiff is simply one of the many victims of this piracy. Capture data collected by the Plaintiff’s expert evidences that its motion picture “Mechanic 2: Resurrection” was pirated 51,462,897 times worldwide, 8,545,313 times in the United States, and 50,014 times in Nevada alone. Even if we assume that only a third of BitTorrent users

¹ THE ECONOMIC IMPACTS OF COUNTERFEITING AND PIRACY, FRONTIER REPORT, 2017; http://www.inta.org/Communications/Documents/2017_Frontier_Report.pdf, (Digital piracy in Film: \$160b in 2013, projected to as much as \$644b in 2022. P.7; “It seems straightforward to attribute BitTorrent as responsible for these negative developments.” P. 24).

² *Id.*

1 would have lawfully purchased the Plaintiff's motion picture or viewed it in theaters, the
 2 foregoing capture data evidences a direct estimated loss of USD\$137,234,392 in gross revenue,³
 3 which happens to be roughly twenty million more than the film's total, combined, worldwide
 4 box office receipts. These cases are not frivolous; they are essential to the preservation of our
 5 nation's intellectual property laws.

6 In an effort to combat the rampant piracy of its motion picture, the Plaintiff sought to
 7 enforce its copyrights through its only available avenue – through litigation. However, even
 8 adding together all of the defendants in all of the suits filed by the Plaintiff throughout the United
 9 States, those defendants represent a miniscule share of the total infringements of its copyrights
 10 occurring nationwide.⁴

11 If these cases seem administratively burdensome, this is not the fault of the Plaintiff.
 12 The Plaintiff is merely attempting to police its intellectual property rights in the only way it can.
 13 It is not the Plaintiff's fault that the Defendants have collectively chosen to use a decentralized
 14 file-sharing network, deliberately designed to frustrate enforcement efforts – a system designed
 15 to make litigation difficult and burdensome.

16 Meanwhile, Plaintiff has taken great pains to find the most efficient and effective
 17 means of pursuing its claims without unduly prejudicing the rights of individual defendants (or
 18 prospective defendants, for that matter). The process presently employed is as follows: (1)
 19 identify separate swarms of infringing IP Addresses; (2) out of those IP Addresses, further
 20 identify the 1-2% most egregious offenders; (3) file suit against the most egregious offenders in
 21 each swarm in sets of 10-30 Does per case; (4) once the Defendants are identified, through
 22 settlement and investigation, further narrow the pool of Defendants in each case down to ten or
 23 fewer; and (5) to the extent that any defendant raises a distinct defense or cause of action, sever
 24 only that Defendant into a separate case and leave the remaining Defendants.

25 The process described above is designed to impose the least expense on all parties
 26 involved – including the Court. To sever all Defendants, as contemplated in the R&R, would
 27 either result in a costly explosion of new lawsuits against single Doe defendants, or cause
 28

³ This calculation is assuming an average theater ticket price of \$8.00.

⁴ For example, in Nevada, the Plaintiff filed suit against roughly 1% of the total infringers in this State.

1 Plaintiffs to forgo litigation in our jurisdiction, allowing Nevada's BitTorrent usage to continue
 2 to grow undeterred. Both of the foregoing options are contrary to the interests of justice and the
 3 preservation of the rule of law.

4 In entering her R&R, Judge Koppe asserted that the "majority approach" in the Ninth
 5 Circuit is to prohibit joinder in BitTorrent cases, seemingly basing her entire argument on this
 6 assertion, reiterating it five (5) times throughout the R&R. However, that is simply not true. The
 7 position she argues for is NOT the majority approach in the Ninth Circuit. In fact, the majority
 8 of Courts within the Ninth Circuit have held the exact opposite of what is stated in the R&R;
 9 they have held that joinder in BitTorrent cases is not only permissible but also good policy. As
 10 explained in more detail below, fifty percent (50%) of the District Courts in the Ninth Circuit
 11 that have taken up this issue routinely allow joinder; thirty percent (30%) allow joinder
 12 sometimes; and only twenty percent (20%) have prohibited joinder outright in these cases.⁵ For
 13 the R&R to conclude that severance is the "majority approach" is just wrong. While Judge
 14 Koppe cites to numerous cases to support her argument, those cases are mostly out-of-date and
 15 do not reflect the current approach in the individual jurisdictions.

16 For instance, Judge Koppe appears to rely heavily upon the reasoning set forth in a
 17 2012 opinion from Judge Tielborb in Arizona.⁶ However, Arizona has largely abandoned the
 18 approach taken in that case. Indeed, the Plaintiff filed nineteen (19) cases in Arizona in 2016,
 19 and joinder was granted in each and every case.⁷ In fact, Arizona's Judge Campbell, who
 20 penned another opinion cited by Judge Koppe,⁸ directly addressed this issue and ultimately
 21 determined that joinder in the Plaintiff's cases was proper.⁹ To this end, the Arizona Court has
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 24

25 ⁵ *Infra*, pp. 7-9.

26 ⁶ *Third Degree Films, Inc. v. Does 1-131*, 280 F.R.D. 493, 498 (D. Ariz. 2012); *See also* R&R at p. 4.

27 ⁷ *See* Exhibit "AG."

28 ⁸ *Riding Films, Inc. v. John Does I-CCL*, Case No. CV 13-00299-PHX-DGC, 2013 WL 2152552, at *3 (D. Ariz. May 16, 2013); *See also* R&R at p. 6, lines 13-16.

⁹ *See LHF Productions v. Does 1-21*, Case CV16-2632 PHX DGC, Order to Show Cause, Dkt. No. 8 (Ariz., September 6, 2016), Exhibit "Z"; *see also* Case CV16-2632 PHX DGC, Memo Reg App of Riding Films, Dkt. No. 9 (Ariz., Sep. 12, 2016), Exhibit "AA"; *see also* Case CV16-2632 PHX DGC, Order, Dkt. No. 10 (Ariz., Sep. 21, 2016), Exhibit "AB".

1 actually begun consolidating these cases for purposes of streamlining discovery and reducing the
2 overall administrative burden.¹⁰

3 The following argument shows that: (i) the analysis of the R&R is based on an outdated
4 analysis of the prevailing case law that is logically unsound; (ii) the joinder of Defendants in the
5 Plaintiff's cases is not only proper under FRCP 20(a)(2), it is far and away the most efficient and
6 effective means of identifying and pursuing infringers, imposing the least possible burden upon
7 the Court and the Defendants. To upturn this process, by requiring the Plaintiff to separately file
8 suit against each Doe defendant, serves no purpose other than to undermine the rule of law and
9 exponentially increase the administrative burden imposed upon the Plaintiff, the Defendants, and
10 the Court. Everyone loses.

11 **II. FACTUAL AND PROCEDURAL BACKGROUND**

12 Plaintiff is the producer of the feature length motion picture, "Mechanic 2:
13 Resurrection." Rainey Decl. at ¶¶ 6-7. This case arises from the Plaintiff's discovery that its
14 film, while still in theatrical release, had been pirated and illegally distributed over the
15 BitTorrent peer-to-peer file-sharing network by millions of users throughout the United States
16 and throughout the world. Rainey Decl. at ¶ 8.

17 In an effort to track and identify the individual infringers responsible for the illegal
18 copying and sharing of its motion picture, Plaintiff engaged the investigative services of
19 MaverickEye, a company organized and existing under the laws of Germany, with its principal
20 address at Heilbronner Strasse 150, 70191 Stuttgart, Germany. Rainey Decl. at ¶ 9.
21 MaverickEye employed its highly sophisticated software to surveil Internet traffic within the
22 BitTorrent network and thereby identify, analyze, archive and document unauthorized copying
23 and distribution of the Plaintiff's motion picture. Rainey Decl. at ¶ 10-11. To date,
24 MaverickEye has identified 79,404,331 instances of infringement of the Plaintiff's motion
25 picture worldwide, including 113,962 instances of infringement occurring within the State of
26 Nevada. Rainey Decl. at ¶ 12.

27 The subject infringers (which includes the Defendants in this case) used BitTorrent
28

¹⁰ See *ME2 Productions v. Does 1-27*, Case 2:17-cv-00210-DGC, Motion to Consolidate, Dkt. No. 7 (Ariz., Feb. 14, 2017) Exhibit "AC"; See also Case 2:17-cv-00210-DGC, Mtn to Consolidate Add'l Cases (Ariz., Mar. 9, 2017) Exhibit "AD"; See also Case 2:17-cv-00210-DGC, Order (Ariz. Mar. 28, 2017) Exhibit "AE".

1 client software to search for, copy and download unauthorized and infringing copies of the
2 Plaintiff's motion picture. Rainey Decl. at ¶ 13. Each infringer then made those copies of the
3 Plaintiff's motion picture available for downloading by other BitTorrent users, thus willfully
4 joining in a collective effort (known as "a swarm") to replicate and distribute infringing copies
5 of the Plaintiff's motion picture to one another as well as tens of thousands of other peers
6 within the swarm; this resulted in the unauthorized, viral dissemination of the Plaintiff's
7 motion picture while it was still in theatrical release. Rainey Decl. at ¶ 13.

8 Using geo-location information, MaverickEye then indexed the data by jurisdiction,
9 allowing Plaintiff's counsel access to the full database of infringements occurring within the
10 State of Nevada. Rainey Decl. at ¶ 15. Then, weighing a number of factors, Plaintiff's counsel
11 narrowed the pool of Defendants to the one to two percent (1-2%) of the most egregious
12 infringers within each swarm. Rainey Decl. at ¶ 16. Plaintiff's counsel then further separated
13 out those egregious infringers within each swarm into yet smaller groups of approximately ten
14 (10) to thirty (30). Rainey Decl. at ¶ 17. In each group of ten (10) to thirty (30) infringers, the
15 identified IP Addresses were caught sharing the same digital file, containing the same copy of
16 the Plaintiff's motion picture, over the same peer-to-peer file sharing network, as part of the
17 same so-called "swarm," within the same jurisdiction, within the same finite period of time
18 (usually a period of about two weeks). Rainey Decl. at ¶ 18.

19 Still, in order to ensure the accuracy of the information collected, before filing any
20 given lawsuit, Plaintiff's counsel transmitted the data sets related to the proposed Defendants
21 to a third party consultant, Daniel Arheidt, to review and confirm. Rainey Decl. at ¶ 19. Mr.
22 Arheidt would then review the Defendant data provided by Plaintiff's counsel, crosscheck such
23 data against the database compiled by MaverickEye, and confirm the accuracy of the
24 information. Rainey Decl. at ¶ 20. Only after confirming the accuracy of the data with both
25 MaverickEye and at least one independent consultant, does the Plaintiff move forward with
26 any lawsuit. Rainey Decl. at ¶ 21.

27 The Plaintiff filed the present case against just such a group of 21 Defendant IP
28 Addresses on March 13, 2017. Doc No. 1 at Ex 1. Shortly thereafter, the Plaintiff promptly filed
its *ex parte* motion seeking to open discovery for the limited purpose of unveiling the true

1 identities of the Defendants. Rainey Decl. at ¶ 23. The Court subsequently granted the
2 Plaintiff's motion for discovery, and the Plaintiff then served a subpoena upon the Defendants'
3 Internet Service Provider ("ISP"). Rainey Decl. at ¶ 24.

4 Since receiving the subpoena response from the Defendants' ISP, the Plaintiff has
5 successfully narrowed the case from 21 to 13. Rainey Decl. at ¶ 25. While the Plaintiff removed
6 some Defendants from the case as a result of reaching settlement, still others were removed due
7 to various circumstances unique to those Defendants. Rainey Decl. at ¶ 26. If, upon further
8 investigation, Plaintiff discovers that the situation of any given Defendant is distinctly different
9 from the situation of other Defendants within a given case (raising distinct issues of fact or law),
10 then the Plaintiff typically dismisses those individuals from the case. Rainey Decl. at ¶ 27. In
11 some instances, the Plaintiff may abandon its claims against a given Defendant, noting that the
12 issues raised by the dismissed defendant provide a strong defense or make litigation impractical.
13 Rainey Decl. at ¶ 28. While in other instances, the Plaintiff may elect to dismiss a given
14 Defendant from the case without prejudice, preserving the right to pursue that Defendant
15 separately at a later date. Rainey Decl. at ¶ 29. Likewise, if a Defendant answers the Complaint
16 and at that time suddenly asserts unusual or distinctive arguments, it is the intent of the Plaintiff
17 that such Defendants be severed into a separate lawsuit. Rainey Decl. at ¶ 30.

18 On April 27, 2016, Judge Koppe, on her own initiative, ordered that the Plaintiff show
19 cause why the Defendants should not be severed. This was one of a series of orders to show
20 cause issued in each and every one of the Plaintiff's cases. Identical orders to show cause were
21 also ordered in every case filed by Plaintiff LHF PRODUCTIONS, which shares the same
22 counsel as the Plaintiff in this case. The Court also issued an open invitation to all defendants,
23 not just in this case, but in all of the Plaintiff's cases, and all of the cases filed by LHF
24 Productions, encouraging the hundreds of defendants to file their own arguments. Out of the
25 several hundred defendants in these BitTorrent cases, including several represented by counsel,
26 only one, Brian Kabala, filed anything.¹¹

27 The Plaintiff responded to Judge Koppe's Order to Show Cause on May 18, 2017,
28 arguing that the standard set forth in her OSC had been broadly rejected by courts throughout

¹¹ Case No. 2:16-cv-02028, Dkt. Nos. 55, 58 and 62.

the United States and was plainly bad policy. Plaintiff also requested oral argument. However, the Court denied every one of the Plaintiff's 30+ requests for oral argument. Instead, the Court issued its Report and Recommendation in this matter on June 14, 2017 relying entirely on the pleadings.

Plaintiff now objects to that Report and Recommendations.

III. NINTH CIRCUIT CASE LAW IN BITTORRENT LITIGATION

The R&R sets out a jaw-dropping misstatement of the Ninth Circuit case law related to joinder in BitTorrent cases; contrary to what the R&R states, the majority of District Courts within the Ninth Circuit permit (and in some cases encourage)¹² joinder in BitTorrent litigation. In fact, the R&R relies heavily on the "persuasive authority" of an Arizona case from 2012;¹³ however, Arizona openly embraces joinder in BitTorrent litigation. Indeed, the Plaintiff has filed a total of nineteen (19) suits in Arizona, and the Court has granted joinder in each and every one of those cases.¹⁴ Moreover, Plaintiff's sister company LHF Productions, Inc. has filed Twenty (20) cases in Arizona, and the Court has accepted joinder in each of those cases as well.¹⁵ In fact, the District of Arizona has recently reversed course and sought to consolidate BitTorrent cases for purposes of discovery.¹⁶

Out of the fifteen District Courts within the Ninth Circuit, only two have taken the hardline approach argued for in the R&R: the Central and Northern Districts of California. While three other Districts, the District of Oregon and the Southern and Eastern Districts of California, struggle with the joinder issue, sometimes allowing joinder and other times not,¹⁷ the remaining

¹² See e.g., *Thompsons Film, LLC v. Doe*, 2013 U.S. Dist. LEXIS 112129, at 6 (W.D. Wash. Aug. 7, 2013) ("Jointly litigating these claims also allows defendants, many of whom will undoubtedly proceed pro se, to pool resources, rely on arguments raised by other defendants, and/or benefit from the participation of retained counsel.").

¹³ R&R at p. 4, lines 13-25, quoting *Third Degree Films, Inc. v. Does 1-131*, 280 F.R.D. 493, 498 (D. Ariz. 2012).

¹⁴ See Ex. AF.

¹⁵ See Ex. AG.

¹⁶ See Ex. AC, and AD, and AE.

¹⁷ See e.g., *Liberty Media Holdings, LLC v. Does 1-62*, Case No. 11-cv-575-MMA (NLS), Order re: Motions to Quash Subpoena and Dismiss (S.D.Cal, Feb. 24, 2012) Ex. "AH"; see also *Arista Records v. Does 1-9*, 2:08-cv-1655-JAM-JFM, Order Granting Ex Parte Application (E.D.Cal, July 22, 2008) Ex. "AM"; see also *Elektra Entertainment v. Does 1-30*, 3:07-cv-01703-H-JMA (Sep. 14, 2007) Ex. "AL."

Districts that have dealt with this issue (5 in total) currently allow joinder in Cyber-Piracy cases such as the one at hand.¹⁸

In summary: fifty percent (50%) of the District Courts in the Ninth Circuit faced with BitTorrent litigation routinely allow joinder; thirty percent (30%) allow joinder sometimes; and only twenty percent (20%) have outright prohibited joinder in the manner prescribed by the R&R. For the R&R to conclude that severance is the “majority approach” of the Courts within the Ninth Circuit is just plain wrong.

As mentioned earlier, the R&R relies heavily upon the “persuasive authority” of Arizona, principally relying upon the case of *Third Degree Films v. Does 1-131* – a 2012 opinion penned by Judge Teilborg, which involved more than one hundred defendants.¹⁹ However, that case is clearly not so persuasive in its home state of Arizona, where the LHF Productions, Inc. addressed this issue head-on and successfully obtained joinder in all twenty (20) of its cases filed in that District.²⁰ The foregoing opinion has been all but abandoned by Arizona, as the Court not only permitted joinder in all nineteen (19) cases filed by the Plaintiff,²¹ but also ultimately decided to consolidate those cases for purposes of judicial efficiency.²² In light of the foregoing facts, we can safely say that the Judge Tielborg’s opinion in *Third Degree Films* is either no longer the law of the land in Arizona or is at least distinguishable from the case at hand.

The R&R cites to roughly twenty-six (26) cases to support its contention that the “majority approach” within the Ninth Circuit’s is to find joinder improper in BitTorrent cases.²³ However, of the 26 cases cited, only three (3) were penned within the last four years. Most of the citations were more than five years old. Moreover, all of the cases cited come from only six (6) of the Circuit’s fifteen (15) districts: Arizona, Oregon, and the Central, Eastern, Northern and Southern Districts of California. As already explained, Arizona has reversed course and now

¹⁸ If we exclude Nevada from this formula, then 44% of Districts consistently allow joinder, 33% allow joinder sometimes, and 22% do not allow joinder. However, as noted in Exhibit Y, a little over 77% of the jurisdictions nationwide permit joinder.

¹⁹ 280 F.R.D. 493, 498 (D. Ariz. 2012).

²⁰ See *LHF Productions v. Does 1-21*, Case CV16-2632 PHX DGC, Order to Show Cause, Memo Reg App of Riding Films, Order, Dkt. Nos. 8, 9, 10 (Ariz., September 6, 2016), Ex Z, AA, AB; See also Dockets from LHF and ME2 cases, Ex AF, AG.

²¹ *Id.*; Ex AF.

²² *Id.*; Ex AG.

²³ R&R at pp. 4-8.

1 openly permits joinder in BitTorrent litigation.²⁴ Meanwhile, Oregon and the Southern and
 2 Eastern Districts of California have waived on the issue, sometimes allowing joinder and
 3 sometimes not.²⁵ At the same time, Hawaii, and the Eastern and Western Districts of
 4 Washington have consistently allowed joinder in these cases.²⁶

5 Even in Oregon, where the Court continues to struggle with the joinder issue, the Court
 6 has at least taken efforts to streamline and expedite the discovery process in single Doe cases,
 7 issuing a standing order that allows BitTorrent plaintiffs expedited discovery. The R&R
 8 mischaracterizes the foregoing standing order as merely a standing order prohibiting joinder
 9 within the District.²⁷ In fact, the standing order in question is designed to allow expedited
 10 discovery in single Doe cases within the District. To clarify this, a copy of the standing order is
 11 attached hereto for the Court's review.²⁸

12 While one could reasonably argue that the Ninth Circuit is conflicted on this issue and
 13 that the state of the law is in flux, for the R&R to state, as it does, that the majority approach of
 14 the Ninth Circuit is to prohibit joinder in these cases is not just an over-statement; it is simply
 15 wrong.

16 **IV. LEGAL ARGUMENT**

17 Rules 19 and 20 of the Federal Rules of Civil Procedure govern the joinder of parties in a
 18 civil action. Rule 19 sets out the circumstances where joinder of parties is required, while Rule
 19 20 set out the circumstances where joinder is permitted. In the instant case, the Court's concerns
 20 are centered on the issue of permissive joinder of defendant parties, governed by FRCP 20(a)(2),
 21 which reads, in relevant part, as follows:

- 22 (2) **Defendants.** Persons [...] may be joined in one action as defendants if:
 23 (A) any right to relief is asserted against them jointly, severally, or in the
 24 alternative with respect to or arising out of the same transaction,
 25 occurrence, or series of transactions or occurrences; and
 (B) any question of law or fact common to all defendants will arise in the
 action.

26 ²⁴ *Supra*, N. 22.

27 ²⁵ *Supra*, N. 17.

28 ²⁶ See e.g., *Cell Film Holdings v. Does 1-10*, 1:16-cv-00441-DKW-KSC, pp. 1-12 (HI, Aug. 10, 2016); *Cook Productions v. Does 1-8*, 1:16-cv-00637-BMK-NONE, pp. 1-3 (HI, Dec. 12, 2016); *Thompsons Film, LLC v. Doe*, 2013 U.S. Dist. LEXIS 112129, at 6 (W.D. Wash. Aug. 7, 2013); *Thompson Film, LLC v. Does 1-35*, 13-CV-0126-TOR, Order Denying Motions to Quash (E.D. Wash. July 12, 2017) Ex. AK.

²⁷ See R&R at p. 8, lines 11-16.

²⁸ See Oregon Standing Order, attached as Exhibit "AI."

Then, “once these requirements are met, a district court must examine whether permissive joinder would ‘comport with the principles of fundamental fairness’ or would result in prejudice to either side.” *Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 870 (9th Cir., 2013) (quoting *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir.2000)). As noted by both the Supreme Court and the Ninth Circuit, “[u]nder the rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966); quoted in *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d at 917. To this end, “Rule 20 is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits.” *League to Save Lake Tahoe*, 557 F.2d at 917, citing *Mosely v. General Motors Corp.*, 497 F.2d 1330. Moreover, we must interpret Rule 20(a)(2) through the lens of FRCP 1, which requires that each rule be “construed and administered to secure the just, speedy and inexpensive determination of every action or proceeding.” Fed. R. Civ. P. 1.

A. DEFENDANTS WERE PROPERLY JOINED PURSUANT TO FRCP 20(a)(2), GIVEN THAT DEFENDANTS DIRECTLY PARTICIPATED IN A BITTORRENT “SWARM”, ILLEGALLY DOWNLOADING AND SHARING THE SAME COMPUTER FILE AMONGST THEIR SWARM CO-CONSPIRATORS.

The claims against the Defendants’ easily meet the Rule 20 criteria for arising out of the same transaction or occurrence and further turns upon the same, identical issues of fact and law. In this case, the Defendants acted in a concerted coordinated effort, relying upon each other in order to build a stable peer-to-peer swarm, for the express purposes of making unauthorized digital copies of the Plaintiff’s copyrighted work. The same, identical issues of fact and law cut across the claims against every one of the Defendants. For these reasons and others explored below, the majority of jurisdictions concur that joinder is proper in these cases.

1. The Plaintiff’s claims against the Defendants arise out of the same series of transactions/occurrences, because the Defendants acted in concert in a combined effort to commit multiple infringements of the Plaintiff’s motion picture.

“There is no bright-line definition of ‘transaction,’ ‘occurrence,’ ‘or ‘series.’ ... Although there might be different occurrences, where the claims involve enough related

operative facts, joinder in a single case may be appropriate.” *Robinson v. Geithner*, 1:05-cv-01258, (E.D. Cal., Jan. 10, 2011), citing *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997)(“Transaction or occurrence” refers to “similarity in the factual background of a claim”). In construing the meaning of “transaction or occurrence” under Rule 20(a), this Court has previously relied upon the framework handed down by the Eight Circuit in *Mosely v. General Motors Corp.*, noting that the Ninth Circuit has, on several occasions, favorably cited to *Mosely* on joinder issues. See *Waterfall Homeowners Ass’n v. Viega, Inc.* No. 2:11-cv-01498-JCM-GWF (D. Nev., January 30, 2012) (citing to *Mosely v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974); see also *League to Save Lake Tahoe*, 557 F.2d at 917 (9th Cir. 1977).

In *Mosely*, the Court posited:

In ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, a case by case approach is generally pursued. No hard and fast rules have been established under the rule. However, construction of the terms ‘transaction or occurrence’ as used in the context of Rule 13(a) counterclaims offers some guide to the application of this test. For the purposes of the latter rule, ‘Transaction’ is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. Accordingly, all ‘logically related’ events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. The analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary.

497 F.2d at 1333 (internal citations omitted).

Under this “logically related” test, the terms “same transaction or occurrence” is interpreted “liberally in order ‘to enable the court to promote judicial economy by permitting all reasonably related claims for relief by or against different parties to be tried in a single proceeding.’” *Liegey v. Ellen Figg, Inc.*, 2003 U.S. Dist. LEXIS 9898, at 6 (S.D.N.Y. June 11, 2003). For instance, the Second Circuit, which deploys the same standard, “take[s] a broad view, not requiring an absolute identity of factual backgrounds . . . but only a logical relationship between them.” *Blesedell v. Mobil Oil Co.*, 708 F. Supp. 1408, 1421 (S.D.N.Y. 1989). Nor does “joinder . . . depend on the existence of claims arising from the same incident or occurrence; rather, ‘transaction is a word of flexible meaning [that] . . . may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.’” *Barnhart v. Town of Parma*, 252 F.R.D. 156, 160

(W.D.N.Y. 2008) (internal citations omitted). All that is required “is substantial evidentiary overlap in the facts giving rise to the cause of action against each defendant.” *In re EMC Corp.*, 677 F.3d 1351, 1358 (Fed. Cir. 2012).

In the immediate case, the claims against the Doe Defendants more than satisfy the foregoing “logical relationship” test. The Doe Defendants are accused of infringing the same copy of the same motion picture created from the same initial seed file in the same judicial district via the same method of BitTorrent file sharing during the same period of time and as co-participants of the same BitTorrent swarm of peers.

Furthermore, the Defendants in this case, not only interacted with each other within the swarm, but also relied upon each other. The more users within the P2P network simultaneously sharing the Plaintiff’s motion picture meant that the Defendant infringers could enjoy faster downloading speeds and higher quality. There are clearly commonalities in their cooperative activity furthering the BitTorrent economy of piracy, as each computer participating in the group of peers sharing a given file on BitTorrent connects with every other computer in that group, sometimes directly and sometimes indirectly, as they each share the same file. Even the *AF Holdings* case (a file sharing case where mass joinder was held as improper), admits that claims made against defendants downloading the same file within the same swarm meet the Rule 20 standard of arising out of the same transaction or occurrence. *See AF Holdings LLC v. Doe*, 752 F.3d 990, 998 (DC Cir., 2014) (the Court noted that while Defendants within the same swarm would likely meet the standards for joinder, the Plaintiff had failed to allege that the more than one thousand Doe defendants had participated in the same swarm).

Courts throughout the country have come to the same conclusion. *See, e.g., Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. at 244 (S.D.N.Y. 2012) (J. Nathan) (“it is difficult to see how . . . a series of individuals connecting . . . with each other or as part of a chain or ‘swarm’ of connectivity designed to illegally copy and share the exact same copyrighted file . . . could not constitute a ‘series of transactions or occurrences’ for purposes of Rule 20”). (J. Buchwald) (“We cannot agree that . . . defendants are ‘not related in any way except the method that was allegedly used to violate the law.’”) (citations omitted); *In re Adult Film Copyright Infringement Litig.*, 2012 U.S. Dist. LEXIS 41260, at 4-5 (S.D.N.Y. Mar. 26, 2012) (J. Forrest) (finding the

“transaction or occurrence” prong met where “plaintiffs have alleged that all defendants . . . traded the exact same file of a copyrighted work . . . in a ‘Peer-to-Peer’ network that utilizes a ‘swarm’ system . . .”).

Moreover, whether actions of different Defendants are “discrete and separate” or whether Defendants acted independently without “concerted action” is of little relevance to the Rule 20 analysis. The Federal Circuit dealt with this issue in *In re EMC Corp.* In that case, the Federal Circuit reviewed a district court’s decision to join defendants in a single patent infringement action. *In re EMC Corp.*, 677 F.3d at 1353. The defendants argued that “because there was no concert of action, the claims against them did not arise out of the same transaction or occurrence, as required by Rule 20 . . .” *Id.* The Federal Circuit disagreed, noting that “the mere fact . . . a case involves independent actors as defendants does not necessarily bring the case outside the scope of Rule 20.” *Id.* at 1357. According to the Federal Circuit:

independent defendants satisfy the transaction-or-occurrence test of Rule 20 when there is a logical relationship between the separate causes of action. *The logical relationship test is satisfied if there is substantial evidentiary overlap in the facts giving rise to the cause of action against each defendant.*

In re EMC Corp., 677 F.3d at 1358 (emphasis added).

In other words, Rule 20 is not concerned with whether the Defendants’ acts arise out of the same transaction or occurrence, but rather whether “[a] right to relief . . . asserted against them” (i.e., whether the causes of action) arise out of the same transaction or occurrence. *See* Fed. R. Civ. P. 20 (a)(2)(A).

In the present case, the causes of action (i.e., joint liability for contributory and direct infringement) arise out of the precise same set of facts giving rise to liability for the underlying direct infringements—plain and simple. Whether Defendants acted independently or without “concerted action” is not actually a required element of Rule 20(a)(2)(A), nor is the possibility that Defendants acted at different times, as the “transaction or occurrence” prong of Rule 20 does not contain a temporal requirement. *See, e.g., Malibu Media, LLC v. Doe*, 285 F.R.D. 273, 277 (S.D.N.Y. 2012) (“[T]he law of joinder does not have as a precondition that there be temporal distance or temporal overlap . . .”) (quoting *Patrick Collins, Inc. v. Doe*, 282 F.R.D. 161, 168 (E.D. Mich. 2012)); *John Wiley & Sons, Inc.*, 2013 U.S. Dist. LEXIS 36359, at 5 (SDNY, 2016);

1 *Blesedell*, 708 F. Supp. at 1421 (“[The ‘transaction or occurrence’ prong] may comprehend a
 2 series of many occurrences, depending not so much upon the immediateness of their connection
 3 as upon their logical relationship.”) (citations omitted); *Purzel Video GmbH*, 2013 U.S. Dist.
 4 LEXIS 179738, at 13 (N.D. Ill., 2013) (“all that Rule 20 requires ‘is a logical relationship
 5 between the separate causes of action,’ not a precondition of acting ‘in concert’ or ‘temporal
 6 distance or temporal overlap.’”) (citations omitted); *Patrick Collins, Inc. v. Doe*, 2012 U.S. Dist.
 7 LEXIS 192277, at 12 (N.D. Fla. Oct. 16, 2012) (“The temporal distance of several months
 8 between the download of the files by various Doe defendants does not change this Court’s
 9 reasoning.”). In fact, Rule 20 expressly contemplates a “series” of transactions or occurrences
 10 and, thus, that disparate activities of different defendants may give rise to permissive joinder
 11 even when they occur at different times. *See* Fed. R. Civ. P. 20 (a)(2)(A). Therefore, the
 12 allegations of the present complaint, alleging claims against a swarm of Defendants that acted in
 13 concert within a relatively narrow span of time, more than meet the “transaction or occurrence”
 14 prong of Rule 20.

15 **2. *The Plaintiff’s claims against the Defendants turn upon the same questions of***
 16 ***law and fact, accusing each of the Defendants of the same, identical tortious***
 17 ***conduct: copyright infringement.***

18 The second prong of Rule 20(a)(2) is satisfied so long as “any question of law or fact
 19 common to all defendants will arise in the action.” Fed. R. Civ. P. 20 (a)(2)(B) (*emphasis*
 20 *added*). “The rule does not require that *all* questions of law and fact raised by the dispute be
 21 common.” *Blesedell*, 708 F. Supp. at 1422 (emphasis in original).

22 In the present case, it is abundantly obvious that there are common issues of fact and law
 23 related to all of the Defendants. As described above, the various allegations against the Doe
 24 Defendants contain substantial evidentiary overlap, especially when considering the contributory
 25 and direct infringement allegations together. Plaintiff is asserting the same copyright against all
 26 Defendants and basing liability on the same use of the BitTorrent network by the same Doe
 27 Defendants participating in the same swarm to illegally copy and distribute the same copy of the
 28 Plaintiff’s motion picture. Establishing these facts will require the same evidence and expert
 testimony, and implicate the same body and application of copyright and procedural law. The
 evidentiary overlap in this case is self-evident and demonstrates a clear and obvious logical

relationship among the claims asserted against the Doe Defendants. These issues will invoke the same issues of copyright law and the same set of underlying facts. Similarly almost all defenses that might be raised by any defendant (plaintiff's ownership, facts of the complaint, investigative data, etc.) will be common to all defendants. The "common question" prong of Rule 20 is therefore easily met.

At least one court has even suggested that the combined contributory and direct infringement in BitTorrent infringement is so interrelated, that joinder may actually be "required" under Fed. R. Civ. P. 19. *See* Memorandum and Opinion, *Malibu Media, LLC v. Lee*, No. 12-cv-03900 (D.N.J. May 22, 2013), ECF No. 44 at 14 (refusing to strike affirmative defense of "Failure to Join Necessary and Indispensable Parties" in part because Plaintiff alleged contributory infringement).

B. ALLOWING JOINDER IN THIS CASE COMPORTS WITH PRINCIPALS OF FUNDAMENTAL FAIRNESS AND POSES NO PREJUDICE TO ANY PARTY IN THIS CASE.

Even if these requirements are met, a district court must examine whether permissive joinder would "comport with the principles of fundamental fairness" or would result in prejudice to either side. *Desert Empire Bank v. Insurance Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980). For the reasons discussed below, most, if not all, discretionary considerations addressed by Courts in the BitTorrent context either do not apply to the present case or have been adequately addressed by additional steps taken by plaintiff to alleviate possible concerns. Moreover, some of the concerns raised by outlier opinions, like those cited by the Court in its Order to Show Cause, are based on flawed reasoning that contradicts the actual circumstances of BitTorrent litigation.

The majority of Courts throughout the United States allow joinder in BitTorrent cases. *See e.g., Patrick Collins v. Does 1-15*, No.11-cv-02164-CMA-MJW pp.7-8 (D. Colo. Feb. 8, 2012); *Cobbler Nev., LLC v. Does 1-28*, No. 15-C-7538, pp. 4-11 (N.D. Ill., Jan 15, 2016); *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 244 (S.D.N.Y. 2012); *Malibu Media, LLC v. Lee*, No. 12-cv-03900, docket (D.N.J. May 22, 2013) (docket shows Court permitted initial joinder of 62 Defendants, more than a year later, as case appeared to languish, Court threatening to sever, but upon Plaintiff's voluntary dismissal of a handful of remaining Doe Defendants,

1 Court allowed the matter to proceed against multiple named Defendants); *see also* ME2
 2 *Productions v. Does*, 1-14, 2:16-cv-01062-JLG-EPD, pp. 1-2 (S.D.OH., Nov. 8, 2016); ME2
 3 *Productions v. Does 1-13*, 5:16-cv-00083-EKD, pp. 1-2 (W.D.VA, Dec. 19, 2016); *Cell Film*
 4 *Holdings v. Does 1-10*, 1:16-cv-00441-DKW-KSC, pp. 1-12 (HI, Aug. 10, 2016); Cook
 5 *Productions v. Does 1-8*, 1:16-cv-00637-BMK-NONE, pp. 1-3 (HI, Dec. 12, 2016); ME2
 6 *Productions v. Does 1-10*, 3:16-cv-00702-JHM-DW, p. 1 (W.D.KY, Jan 9, 2017); Cook
 7 *Productions v. Does 1-11*, 3:16-cv-00773-JD-MGG, pp. 1-3 (N.D. IN., Dec. 5, 2016); Cook
 8 *Productions v. Does 1-10*, 5:16-cv-00924-D, pp. 1-3 (E.D.NC., Dec. 22, 2016); *Cell Film*
 9 *Holdings v. Does 1-12*, 1:16-cv-01216-CCE-JLW, pp. 1-2 (M.D.NC., Oct. 24, 2016); *LHF*
 10 *Productions v. Does 1-27*, 2:16-cv-01219-DBP, p. 1 (UT, Dec. 8, 2016); *ME2 Productions v.*
 11 *Does 1-12*, 2:16-cv-01955-RSL, pp. 1-2 (W.D.WA., Dec. 28, 2016); *Cook Productions v. Does*
 12 *1-10*, 5:16-cv-00925-D, pp. 1-3 (W.D.NC., Dec. 22, 2016) (Out of a survey of the 40 District
 13 Courts that have heard BitTorrent cases, 31 of them allow joinder). Rainey Decl. at ¶41; *see also*
 14 Ex. Z. In fact, even in outlier jurisdictions, where judges have severed defendants in BitTorrent
 15 cases, those judges are generally in the minority of their own jurisdictions. *See e.g., Patrick*
 16 *Collins, Inc. v. John Does 1-21*, 282 F.R.D. 161 (E.D. Mich., 2012) (Joinder found proper) and
 17 *Patrick Collins, Inc. v. John Does 1-23*, 2012 WL 1019034 (E.D. Mich., 2012) (Joinder denied).

18 The reliance on joinder in the overwhelming majority of jurisdictions arises from the
 19 simple fact that joinder is preferable to all of the parties involved, including the Court. Joinder
 20 minimizes the administrative burden on the Court. Joinder enables the Plaintiff to more
 21 effectively and efficiently conduct discovery. Most notably, joinder benefits defendants because
 22 they “benefit from being able to obtain communal discovery and observe the defenses raised by
 23 the other defendants.” *Malibu Media, LLC v. Doe*, 291 F.R.D. 191, 205 (N.D. Ill. 2013)
 24 (citations omitted); *see also Thompsons Film, LLC v. Doe*, 2013 U.S. Dist. LEXIS 112129, at 6
 25 (W.D. Wash. Aug. 7, 2013).

26 **1. Joinder is in the interests of the Court, the Plaintiff and, most notably,**
 27 **the Defendants; severing the Defendants does nothing but prejudice the**
 28 **rights of the various parties.**

Without a doubt, the enforcement of plaintiff’s rights is a burden on the courts.
 Thousands of acts of infringement in this District, causing hundreds of thousands of dollars of

injury, when policed as opposed to being ignored cannot help but strain resources. However, even though justice may be difficult to administer, the difficulty should not be a barrier to relief. *Marbury v. Madison*, 5 U.S. 137 (1803). However, joinder of the defendants creates judicial efficiency, particularly at the earlier stages of the litigation.

The defendants presented individually would likely file the same motions to quash, have the same defenses, and there would be excessive redundancy if the Plaintiff were forced to file its cases against each Doe defendant individually. The savings to the plaintiff in joinder cases are also afforded the Court. While the administrative burden of the present case is very real, the burden is far less than if the cases were presented individually; and, the burden pales in comparison to the harm endured by Plaintiff and others should the law be ignored. The interests of justice favor joinder.

a) Joinder serves the interests of the Court.

Joinder of defendants creates efficiencies for the courts, particularly at the earlier stages of litigation. *First Time Videos, LLC v. Does 1-500*, 276 F.R.D. 241, 252-53 (N.D. Ill. 2011) (“[J]oinder at this stage is . . . in the interest of convenience and judicial economy [and] does not create any unnecessary delay nor does it prejudice any party.”); *Raw Films, Ltd. v. Does*, 2012 U.S. Dist. LEXIS 41645, at 13 (E.D. Pa. Mar. 23, 2012) (“consolidating early discovery for the purpose of determining the scope of claims and defenses will foster judicial economy.”). Discovery in a joined case is far more efficient than conducting the same discovery in multiple cases because joinder “expedites the process of obtaining identifying information, which is prerequisite to reaching the merits of plaintiff’s claims.” *Voltage Pictures, LLC v. Doe*, 818 F. Supp. 2d 28, 42 (D.D.C. 2011). “Individual litigations, at least at the early stages of litigation, would be needlessly expensive for both [Plaintiff] and the courts and would frustrate the judicial efficiency policies at the heart of Rule 20.” *TCYK, LLC v. Doe*, 2014 U.S. Dist. LEXIS 21026, at 11 (N.D. Ill. Feb. 20, 2014). Any loss of revenue resulting from a single filing fee is far outweighed by the gains in judicial efficiency afforded by joinder. *Malibu Media, LLC v. Doe*, 2012 U.S. Dist. LEXIS 170987, at 24 (N.D. Ind. Dec. 3, 2012) (“Although the judicial system

1 may lose revenue from the filing fees . . . , the efficiency and facilitation of discovery that joinder
2 brings, at least at this stage, outweigh this concern.”).

3 Some courts have suggested that joinder may lead to logistical issues affecting case
4 management, such as an inability to accommodate mass numbers of defendants in a single
5 courtroom or at a deposition. *See, e.g., Hard Drive Prods. v. Does 1-188*, 809 F. Supp. 2d 1150,
6 1164 (N.D. Cal. 2011) (severing Does 2-188 because “the court’s courtroom could not
7 accommodate all of the defendants and their attorneys, and therefore could not hold case
8 management conferences and could not try all of plaintiff’s claims together.”); *Next Phase*
9 *Distrib., Inc. v. Does 1-27*, 284 F.R.D. 165, 170 (S.D.N.Y. 2012).

10 However, in the vast majority of the cases where these concerns were raised, plaintiffs
11 sought to join unmanageable numbers of defendants. *See, e.g., On the Cheap, LLC v. Does 1-*
12 *5011*, 280 F.R.D. 500, 501 (N.D. Cal. 2011) (5011 defendants); *Hard Drive Prods.*, 809 F. Supp.
13 2d at 1164 (188 defendants); *Dragon Quest Prods., LLC v. Does*, 2013 U.S. Dist. LEXIS 83683,
14 at 2 (D.N.J. June 13, 2013) (105 defendants); *Kill Joe Nevada, LLC v. Does 1-99*, 2013 U.S.
15 Dist. LEXIS 74988, at 10 (N.D. Ga. May 28, 2013) (99 defendants); *Next Phase Distrib., Inc.*,
16 284 F.R.D. at 170 (27 defendants). Where a plaintiff seeks to join a manageable number of
17 parties, severance is unwarranted. *See, e.g., Malibu Media, LLC*, 285 F.R.D. at 278-79
18 (recognizing potential logistical issues with joining “hundreds of individual defendants,” but not
19 where plaintiff “deliberately [limits] its action” to a manageable number of defendants.); *Malibu*
20 *Media LLC v. Doe*, 2012 U.S. Dist. LEXIS 189311, at 16-17 (E.D. Mich. Oct. 31, 2012) (finding
21 no potential for logistical issues where “the number of Defendants is not obviously too
22 numerous.”).

23 Logistical issues are not a concern in this case because Plaintiff has limited the action to
24 only 23 (of which, only 4 are remaining) — a reasonable and manageable number of parties.
25 Such issues are even less of a concern here because Plaintiff diligently works to settle out and
26 dismiss various Defendants in an effort to substantially reduce the number of Defendants
27 ultimately at trial. *See e.g., Rainey Decl.* at 25. Given the low potential for logistical concerns,
28 the drastic remedy of early severance is simply not warranted. The better course of action is to
“continue to assess whether the case has become logistically unwieldy as it progresses” and deal

1 with logistical issues if and when they arise. *See Malibu Media LLC*, 2012 U.S. Dist. LEXIS
2 189311, at 19.

3 Meanwhile, severance would itself lead to logistical issues for the Court. If Plaintiff were
4 unable to pursue multiple, related defendants in a single action, it would be forced to bring
5 countless single-Doe actions to protect its rights. These actions would involve significant
6 evidentiary overlap, requiring the courts to waste resources resolving the same legal and factual
7 disputes over and over again in different cases and likely result in later consolidation. Indeed,
8 with the growth in Internet piracy and increases in theft of content statistics from the
9 Administrative Office of U.S. Courts show that the number of BitTorrent lawsuits has steadily
10 increased since 2011, reaching more than 50% of all copyright cases filed nationwide in 2015,
11 driven in large part by the reluctance of some courts to permit joinder. Joinder significantly
12 alleviates these issues and reduces strain on the courts.

13 ***b) Joinder serves the interests of the Plaintiff***

14 Courts have recognized, not surprisingly, that joinder serves numerous economies for
15 plaintiffs. For one, “joinder . . . is the single, most efficient mechanism available for the plaintiff
16 to obtain information to identify those allegedly illegally downloading and distributing its
17 movie.” *AF Holdings LLC v. Does*, 286 F.R.D. 39, 55 (D.D.C. 2012). It also allows overlapping
18 issues that would otherwise be litigated repeatedly in multiple actions to be dealt with in a single
19 case. The efficiencies of a joined case also provide Plaintiff with flexibility to consider reduced
20 settlement offers and other settlement arrangements simply not available in single-Doe cases,
21 which do not benefit from economies of scale. Depending on the third party ISPs, plaintiff is
22 able to obtain discovery at a reduced rate for joined cases as it is more economical for an ISP to
23 respond to a single subpoena for ten subscribers than ten subpoenas for single account lookups.
24 And, of course, joining multiple defendants into a single case allows Plaintiff to save
25 substantially on filing fees which, contrary to the suggestion of some courts, is encouraged by
26 the Federal Rules in general and by Rule 20 specifically. *See, e.g.*, Fed. R. Civ. P. 1 (The
27 Federal rules should be construed “to secure the just, speedy, and *inexpensive* determination of
28 every action and proceeding.”) (emphasis added); *Call of the Wild Movie, LLC v. Does 1-1,062*,
770 F. Supp. 2d 332, 341 (D.D.C. 2011) (“Permissive joinder is appropriate ‘to promote trial

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1 convenience and expedite the final resolution of disputes, thereby preventing . . . extra expense
 2 to the parties”) (citations omitted); *Patrick Collins, Inc. v. Doe*, 2012 U.S. Dist. LEXIS
 3 15938, at 10 (D. Colo. Feb. 8, 2012) (recognizing that requiring a plaintiff to pay multiple filing
 4 fees would “further [limit] its ability to protect its legal rights”).

5 Severance, on the other hand, would greatly prejudice Plaintiff by introducing
 6 “significant obstacles in [its] efforts to protect [its] copyrights from illegal file-sharers and this
 7 would only needlessly delay [its] cases.” *Digital Sin, Inc.*, 279 F.R.D. at 244 n.6 (citations
 8 omitted). “[R]equiring aggrieved parties to file hundreds or even thousands of separate
 9 copyright infringement actions would neither be cost effective for the plaintiffs nor promote
 10 convenience or judicial economy for the courts.” *Id.* (citations omitted).

11 Clearly, Plaintiff’s interests favor joinder, especially in the initial stages of litigation.

12 ***c) Joinder serves the interests of the Defendants***

13 Where the economy of joinder is truly appreciable, lies in the underlying and rarely
 14 discussed benefit that is realized by defendants. Joinder helps defendants because they “benefit
 15 from being able to obtain communal discovery and observe the defenses raised by the other
 16 defendants.” *Malibu Media, LLC v. Doe*, 291 F.R.D. 191, 205 (N.D. Ill. 2013) (citations
 17 omitted); *see also Thompsons Film, LLC v. Doe*, 2013 U.S. Dist. LEXIS 112129, at 6 (W.D.
 18 Wash. Aug. 7, 2013) (“Jointly litigating these claims also allows defendants, many of whom will
 19 undoubtedly proceed *pro se*, to pool resources, rely on arguments raised by other defendants,
 20 and/or benefit from the participation of retained counsel.”). For instance, a Doe Defendant may
 21 easily join motions for relief filed by other Doe Defendants (such as motions to dismiss or
 22 summary judgment motions) and benefit from Court Orders favoring other Defendants.

23 Nonetheless, some courts suggest that joinder in BitTorrent cases may unfairly prejudice
 24 defendants, such as by requiring them to serve papers on multiple parties and unfairly burdening
 25 them at trial. *See, e.g., Next Phase Distrib., Inc.*, 284 F.R.D. at 170; *Pictures v. Does*, 2013 U.S.
 26 Dist. LEXIS 66729, at 9-10 (D. Or. May 4, 2013). As described above, however, Plaintiff has
 27 deliberately chosen to proceed against a very limited number of defendants, which will greatly
 28 reduce any concerns of unfairness. Even if this were not the case, and although Plaintiff believes
 that joinder is entirely proper and appropriate in this case, ***Plaintiff expressly agrees to sever into***

1 a separate action, without objection, any named defendant that so requests severance. Rainey
 2 Decl. at ¶ 33. This eliminates completely any potential unfairness or prejudice arising from
 3 joinder, as any named Defendant is free to proceed on a separate track if he/she so chooses.

4 Actions of defendants in other cases also cast doubt on claims of prejudice arising from
 5 joinder. Despite Plaintiff's policy of permitting defendants to proceed on separate tracks, *not a*
 6 *single Doe defendant has ever taken Plaintiff up on its offer*, despite numerous cases throughout
 7 the country naming hundreds of Doe defendants. Rainey Decl. at ¶ 34. The reason for this is
 8 clear. Defendants seek severance only as a strategic move to dispose of the case early, but once
 9 named, demand joinder in order to take advantage of economies inherent in a joint defense. *See,*
 10 *e.g., Thompsons Film, LLC*, 2013 U.S. Dist. LEXIS 112129, at 6 ("The only potential advantage
 11 to severance appears to be the hope that plaintiff will give up its claims, no matter how
 12 meritorious, in the face of mounting costs.").

13 In fact, it is not uncommon for defendants in single-Doe cases to raise an affirmative
 14 defense of *failure* to join parties, and for named defendants in multi-Doe cases to oppose
 15 requests from other defendants to sever. *See, e.g., Order, Malibu Media, LLC v. Fitzpatrick*, No.
 16 1:12-cv-22767 (S.D. Fla. Oct. 22, 2012), ECF No. 54 at ¶ 44 (rejecting defendant's affirmative
 17 defense of "Failure to Join an Indispensable Party" based on plaintiff's purported failure to name
 18 other BitTorrent users); *accord Order, Malibu Media, LLC v. Weaver*, No. 8:14-cv-01580 (M.D.
 19 Fla. Apr. 8, 2016), ECF No. 129; *see also* Opposition, *Clear Skies Nevada, LLC v. Doe-*
 20 *98.232.166.89*, No. 3:15-cv-02142 (D. Or. Jan. 28, 2016), ECF No. 12 (Doe defendant opposing
 21 motion to sever.). In one case, a defendant even suggested that single-Doe cases are "much more
 22 nefarious" than multi-Doe cases. *See Order, Voltage Pictures, LLC v. Revitch*, No. 6:14-cv-
 23 00301 (D. Or. Jan. 23, 2015), ECF No. 46 at 3.

24 The Copyright Act subjects infringers to notable penalties. Civil penalties have increased
 25 to \$150,000 per work in direct response to the proliferation of BitTorrent and Internet piracy. 17
 26 U.S.C. § 504(c). Jury awards for damages have been significant. *Capitol Records, Inc. v.*
 27 *Thomas-Rasset*, 692 F.3d 889 (8th Cir., 2012): \$220,000 for 24 songs, \$9,166 / song. (Note –
 28 There were multiple trials, the first was \$220,000 for 24 songs, the second was \$1,920,000 for 24
 songs, \$80,000 per song. The appeals process left the first verdict intact.); *Sony BMG v.*

1 *Tenenbaum*, 719 F.3d 67 (1st Cir., 2012): \$675,000 for 30 songs, \$22,500 per song, *Cert denied*,
 2 132 S Ct 2431 (2012); *BMG v. Cox*, 1:14-cv-01611 (E.D.VA., Dec. 17, 2015): \$25,000,000 for
 3 about 1400 songs. ~\$18,000 per song (secondary liability.); *Paramount Pictures Corp. v Davis*,
 4 2006 WL 2092581 (E.D. PA, July 26, 2006), \$50,000 for 1 movie. The implication that a
 5 plaintiff gains unfair advantage by reducing the costs at the filing stage by only a fraction of the
 6 potential damages available for an individual case should be balanced against the real exposure
 7 of the defendants.

8 Costs and fees for the willful infringement through BitTorrent are properly assessed
 9 against defendants. 17 U.S.C. § 505; *Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 610–11
 10 (7th Cir. 2002) (Posner, J.) (“[W]illful infringements involving small amounts of money cannot
 11 be adequately deterred (and remember ‘the need in particular circumstances to advance
 12 consideration of . . . deterrence’) without an award of attorneys' fees. No one can prosecute a
 13 copyright suit for \$3,000. [W]e go so far as to suggest, by way of refinement of the *Fogerty*
 14 standard, that the prevailing party in a copyright case in which the monetary stakes are small
 15 should have a presumptive entitlement to an award of attorneys' fees.”). Joinder permits parties
 16 to manage cases at a reduced cost and permits a plaintiff to accept settlements in lesser amounts
 17 and at times waive all costs, fees and damages.

18 If plaintiff were forced to proceed against defendants individually, costs and fees
 19 (transactions costs) would be higher dictating higher settlements and greater burdens on
 20 defendants. Such actions leading to cries that single party cases are a greater burden on
 21 defendants. *See supra*, *Voltage Pictures, LLC v. Revitch*, No. 6:14-cv-00301 (D. Or. Jan. 23,
 22 2015).

23 The reality is with joinder cases plaintiffs are incentivized to settle, often for nominal
 24 damages with the real exposure to most defendants being the costs and fees associated with their
 25 willful conduct, either their own duplicative costs and fees if severed into individual cases, or
 26 those assessed against them.

27 2. ***The Concern of Defendants asserting disparate defenses and factual***
 28 ***arguments is misplaced and premature; the more efficient and effective***
approach is to wait for Defendants to enter an appearance and only
sever those that raise distinctive issues.

Some courts contend that joinder should not be permitted in BitTorrent cases because defendants are likely to raise varying and unrelated defenses which could confuse juries and introduce questions of law and fact that are not common among the defendants. *See, e.g., Next Phase Distrib., Inc.*, 284 F.R.D. at 169 (“once John Does are identified by their ISPs, it is very likely that each John Doe will assert different defenses, thereby adding factual and legal questions that are not common among all the defendants.”); *Malibu Media, LLC*, No. 7:12-cv-03810-ER, ECF No. 5 at 12 (SDNY, 2013) (J. Ramos) (“[e]ach Doe who denies the allegations is likely to assert entirely independent factual defenses.”) (citations omitted).

Prior to the Doe Defendants entering an appearance, it is premature to conclude that they are likely to raise disparate defenses. *See, e.g., Digital Sin, Inc.*, 2012 U.S. Dist. LEXIS 78832, at 7 (J. Furman) (maintaining joinder and agreeing to revisit the issue only “[s]hould an ISP or defendant raise different or conflicting defenses at a later date”); *see also Digital Sin, Inc.*, 279 F.R.D. at 244 (J. Nathan) (maintaining joinder but noting that “[t]he Court remains open, however, to reconsidering [joinder] at a later date”). The Court should address this discretionary consideration—if at all—only after the Doe Defendants appear and raise any relevant defenses. *See, e.g., Malibu Media, LLC*, 285 F.R.D. at 278 (“After plaintiff has effected service on defendants and defendants have responded with any relevant defenses, we are free to determine whether the claims against a particular defendant should be severed.”). Regardless, the concern of varying defenses is simply not an issue in this case and should it become an issue, plaintiff agrees to feely sever any such defendant.

3. *While the Court’s Concern over cyber-piracy plaintiffs engaging in coercive tactics is reasonable, there is no evidence of such conduct on the part of the Plaintiff in this or any other case, and eliminating joinder actually does nothing to address this concern.*

Some courts have expressed concern that joinder in BitTorrent lawsuits may lead to coercion of defendants—that is, “there is a fear that regardless of a defendant’s actual culpability, he may feel compelled to settle the lawsuit confidentially in order to avoid the embarrassment of being named as a defendant in a case” *Malibu Media, LLC*, 285 F.R.D. at 278 (dealing with pornographic content). However, this concern is more prevalent in cases involving allegations of infringement on pornographic content. Courts have tended to deny

1 joinder in the instance of adult content, where the stigma of association makes them more
2 susceptible to abuse. *Id.* However, more recently, even in districts that previously eliminated
3 joinder out of this very concern, the courts have since recognized that joinder is preferable in
4 BitTorrent litigation for general management and economics for the courts, plaintiffs, and
5 defendants when there are no other indicia of abuse. *See e.g., Dallas Buyers Club, LLC v. Does,*
6 *14-cv-1684* (W.D. WA., October 31, 2014); *Elf-Man, LLC v. Does 1-152*, Case No. 13-cv-0507
7 (W.D. WA., March 26, 2013). Moreover, severance does not address the coercion issue; it
8 merely forces plaintiffs to litigate against defendants separately. Indeed, as one court noted
9 “whether it is one defendant or one hundred defendants named in a lawsuit, . . . the copyright
10 holder still has the ability to attempt to convince a defendant to settle or to be identified in a
11 public lawsuit.” *Malibu Media v. Doe*, 2013 U.S. Dist. LEXIS 59278, at 21 (D. Colo. Feb. 12,
12 2013).

13 Even if severance alleviates coercion (which it does not), there is absolutely no evidence
14 that Plaintiff in this case acted coercively or irresponsibly. It would be fundamentally unfair for
15 the Court to effectively punish Plaintiff for the bad actions of a few unrelated third parties.
16 Indeed, as Judge Buchwald noted in *Malibu Media, LLC v. Doe*, the Court should be “reluctant
17 to prevent [P]laintiff from proceeding with its case based only on a ‘guilt-by-association’
18 rationale.” *See Malibu Media, LLC*, 285 F.R.D. at 278 (citing *Third Degree Films*, 2012 U.S.
19 Dist. LEXIS 87891, at 34); *accord Malibu Media LLC*, 2012 U.S. Dist. LEXIS 189311, at 21-22
20 (“in the absence of case-specific allegations of coercion and/or misidentification, discretionary
21 severance . . . is not warranted.”); *Malibu Media, LLC v. Doe*, 2012 U.S. Dist. LEXIS 165525, at
22 9 n.3 (D. Colo. Oct. 25, 2012) (denying severance in part because “there have been no specific
23 allegations of coercion by the Plaintiff.”).

24 However, the potential for coercion in this case is quite low. Courts are concerned most
25 about coercion where suits involve pornographic content; namely, the potential for innocent
26 parties to pay settlement demands to avoid the embarrassment of being publicly associated with
27 pornography. *See Malibu Media, LLC*, 285 F.R.D. at 278; *see also Dragon Quest Prods., LLC*,
28 2013 U.S. Dist. LEXIS 83683, at 17 n.7. Such a danger simply does not exist here. The Plaintiff
is an affiliate of Millennium Media, the production company behind multiple major motion

1 pictures including *The Expendables* series of films, *Olympus Has Fallen* and other major
 2 productions. <http://www.millenniumfilms.com>. The Subject Motion Picture is not an
 3 embarrassing pornographic film, but rather a highly respected, mainstream motion picture starring
 4 A-list actors. *see also* <http://www.imdb.com/title/tt3522806/fullcredits/>. Even so, Plaintiff will
 5 not oppose any request by a Defendant to proceed anonymously, thereby alleviating completely
 6 any concern the Court may have regarding potential coercion resulting from the film's content.

7 Additionally, Plaintiff has no interest whatsoever in pursuing legal action against
 8 innocent or young parties, and for this reason, takes every precaution to ensure that parties
 9 ultimately named in an action are adults whom the Plaintiff believes to be the actual infringers.
 10 For instance, Plaintiff ensures that the accused IP addresses are associated with persistent
 11 BitTorrent activity. Rainey Decl. at ¶ 16. This helps ensure that the named defendants are
 12 individuals with consistent and permissive access to the suspect IP addresses, not merely
 13 transient guests or unknown parties. *Id.* This process also helps filter sporadic infringers in favor
 14 of the worst of the worst—prolific and habitual users of BitTorrent who likely know the full
 15 extent of their wrongdoing. *Id.* It is also worth noting that many of the Defendants repeatedly
 16 infringed Plaintiff's and others' works, despite receiving multiple Digital Millennium Copyright
 17 Act ("DMCA") notices over extended periods of time advising and requesting immediate
 18 termination of the infringing conduct.²⁹ Rainey Decl. at ¶¶ 35-28. Plaintiff also manages its
 19 cases in a responsible manner that avoids the potential for coercion. Plaintiff routinely dismisses
 20 actions against defendants who provide explanations of innocence consistent with data collected
 21 by MaverickEye, and where there is a recognized economic hardship, Plaintiff and its affiliates
 22 have agreed to waive costs, fees and damages where a defendant admits liability, expresses
 23 remorse, and promises to cease infringing activity.

24 Certainly, there is no evidence of the Plaintiff engaging in any coercive or other untoward
 25 conduct. Moreover, given the circumstances of this case, there is very little risk of the Plaintiff

26 ²⁹ Pursuant to 17 U.S.C. § 512, in certain cases, ISPs may limit their liability for copyright infringement committed
 27 by their customers, *inter alia*, if they provide a means by which to receive DMCA notices from copyright owners.
 28 These notices are typically received by the ISPs via mail or special email addresses. The Providers then forward the
 notices to the infringing customers without divulging the customers' identities to the copyright owners. To the
 extent a particular customer is not the infringer, said customer should be expected to take immediate steps to cease
 the infringing activity after receipt of such a notice, such as by notifying family members and ensuring that access to
 any home router is secure

engaging in such conduct. Finally, even if there were a risk of coercive conduct on the part of the Plaintiff, eliminating joinder would do nothing to alleviate that conduct. Eliminating joinder would merely serve to drive up the costs of litigation, overburden our Court, and ultimately prejudice the rights of the Defendants.

VI. CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that the Court not follow the Recommendations of Judge Koppe and allow this case, and the Plaintiff's other cases to proceed on their merits. Moreover, the Plaintiff requests an opportunity to argue this matter in open court and address any direct concerns that the Court may have.

Respectfully submitted this 27th day of June, 2017.

/s/ Charles C. Rainey
CHARLES C. RAINEY, ESQ. (Bar. No 10723)
crainey@hamricklaw.com
HAMRICK & EVANS LLP
7670 W. Lake Mead Blvd., Ste. 140
Las Vegas, Nevada 89128
+1.702.425.5100 (ph)/ +1.818.763.2308 (fax)
Attorney for Plaintiff

HAMRICK & EVANS LLP

**DECLARATION OF CHARLES C. RAINEY IN SUPPORT OF
PLAINTIFF'S OBJECTION TO
THE MAGISTRATE'S JUDGE'S REPORT AND RECOMMENDATIONS
(HEARING REQUESTED)**

I, CHARLES C. RAINEY, the undersigned individual, hereby make the following declaration:

1. I am over the age of 18 and am otherwise competent to make this declaration.

2. This declaration is based on my personal knowledge and, if called upon to do so, I will testify that the facts stated herein are true and accurate.

3. Pursuant to 28 U.S.C. §1746, I hereby declare under penalty of perjury under the laws of the United States of America that the statements made herein are true and correct, except for those matters qualified as stated under my informed belief, and, as to those matters, I believe them to be true.

4. I am the attorney of record for the Plaintiff in the above-captioned case, ME2 PRODUCTIONS, INC., a Nevada corporation.

5. The Plaintiff has hired other attorneys in other jurisdictions to file similar cases, such as Illinois, New York, Oregon, Washington, Arizona, Colorado, and Texas, with whom I have been in contact, in an effort to coordinate our efforts in these cases and develop a set of best practices in anti-piracy litigation.

6. I am informed and believe that Plaintiff is the producer of the feature length motion picture, "Mechanic 2: Resurrection."

7. This belief is supported by the copyright registration for the motion picture on file with the United States Copyright office as well as the fact that the owners of the Plaintiff company are Trevor Short and Avi Lerner, both of whom are identified in the credits of the motion picture as its producers.

8. This case arises from the Plaintiff's discovery that its film, while still in theatrical release, had been pirated and illegally shared over peer-to-peer file sharing networks by countless users throughout the United States and throughout the world.

9. In an effort to track and identify the individual infringers responsible for the illegal copying and sharing of its motion picture, Plaintiff engaged the investigative services of

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1 MaverickEye, a company organized and existing under the laws of Germany, with its principal
2 address at Heilbronner Strasse 150, 70191 Stuttgart, Germany.

3 10. I am informed and believe that MaverickEye employed its software to surveil Internet
4 traffic within the BitTorrent network to identify, analyze, archive and document unauthorized
5 copying and distribution of the Plaintiff's motion picture.

6 11. The data provided by MaverickEye confirmed that the Defendants (originally identified
7 in the present case as John and Jane Does) used BitTorrent client software to purposefully
8 search for and intentionally copy and download unauthorized and infringing copies of the
9 subject film.

10 12. To date, MaverickEye has identified 51,462,897 instances of infringement of the
11 Plaintiff's motion picture worldwide, including 50,014 instances of infringement occurring
12 within the State of Nevada.

13 13. The information provided by MaverickEye further confirmed that each Doe Defendant
14 then made copies of the subject motion picture available for downloading by other BitTorrent
15 users, thus willfully joining in a collective effort (known as "a swarm") to distribute infringing
16 copies of the Plaintiff's motion picture to one another and countless other peers of the swarm
17 for download and distribution during the period of infringement, resulting in the unauthorized,
18 viral dissemination of the Plaintiff's motion picture.

19 14. However, prior to filing the present action, Maverickeye was only able to identify the
20 individual infringers by their respective IP Addresses.

21 15. Using geo-location information, MaverickEye then indexed the data by jurisdiction,
22 allowing Plaintiff's counsel access to the full database of infringements occurring within the
23 State of Nevada.

24 16. Then, weighing a number of factors, I narrowed the pool of Defendants to the one to two
25 percent (1-2%) of the most egregious infringers within each swarm; I cannot share in open
26 Court at this time the specific factors that I rely upon to determine the most egregious
27 BitTorrent users, since divulging such information would likely result in users manipulating
28 their data to evade liability.

1 17. I then further separated out those egregious infringers within each swarm into yet
2 smaller groups of approximately ten (10) to thirty (30) IP Addresses.

3 18. In each group of ten (10) to thirty (30) infringers, the identified IP Addresses were
4 caught sharing the same digital file, containing the same copy of the Plaintiff's motion picture,
5 over the same peer-to-peer file sharing network, as part of the same so-called "swarm," within
6 the same jurisdiction, within the same finite period of time (usually a period of about two
7 weeks).

8 19. In order to ensure the accuracy of the information collected, before filing any given
9 lawsuit, I then transmitted the data sets related to the proposed Defendants to a third party
10 consultant, Daniel Arheidt, to review and confirm.

11 20. I am informed and believe that Mr. Arheidt then reviewed the Defendant data provided
12 by me, crosschecked such data against the database compiled by MaverickEye, and confirmed
13 the accuracy of the information I provided.

14 21. Only after confirming the accuracy of the data with both MaverickEye and at least one
15 independent consultant, do I move forward with any particular lawsuit.

16 22. On behalf of the Plaintiff, I filed the present case against a group of 21 Defendant IP
17 Addresses on March 13, 2017.

18 23. Shortly thereafter, I promptly filed the Plaintiff's *ex parte* motion seeking to open
19 discovery for the limited purpose of unveiling the true identities of the Doe Defendants.
20

21 24. The Court subsequently granted the Plaintiff's motion for discovery, and I then served a
22 subpoena upon the Defendants' Internet Service Provider ("ISP").

23 25. Since receiving the subpoena response from the Defendants' ISP, I have successfully
24 narrowed the case from 21 to 13.

25 26. While I removed some Defendants from the case as a result of reaching settlement, still
26 others I removed due to various circumstances unique to those Defendants.

27 27. If, upon further investigation, I discover that the situation of any given Defendant is
28 distinctly different from the situation of other Defendants within a given case (raising distinct
issues of fact or law), then I typically dismiss those individuals from the case; that said, it

1 should be noted that the arguments raised by most defendants are generally quite similar; it is
2 rare to find a defendant raising a distinctive issue of law or fact in its defense.

3 28. In some instances, I may abandon the Plaintiff's claims against a given Defendant,
4 noting that the issues raised by the dismissed defendant provide a strong defense or make
5 litigation impractical.

6 29. While in other instances, I may elect to dismiss a given Defendant from the case without
7 prejudice, preserving the right to pursue that Defendant separately at a later date.

8 30. Likewise, if a Defendant answers the Complaint and at that time suddenly asserts
9 unusual or distinctive arguments, it is my intent (and the intent of the Plaintiff) to sever such
10 Defendants into a separate lawsuit.

11 31. To this end, I have filed notices of non-opposition with the Court in cases where parties
12 have asked to be severed.

13 32. However, it must be noted that it is rare for a Defendant to request to be severed.

14 33. Furthermore, I (under the direction of the Plaintiff) maintain a strict policy that if, in any
15 case, a named Defendant requests that he/she be severed from a case and tried separately, I will
16 not object or oppose any such request.

17 34. I am informed and believe that, while the Plaintiff has made this open offer to sever
18 individual Defendants in cases throughout the country, Defendants have rarely taken up the
19 offer.

20 35. Finally, it should be noted that the Plaintiff has enacted a notice system throughout the
21 United States that provides BitTorrent users with an early warning of possible litigation.

22 36. The notice system is operated through the Internet Service Providers, so that user
23 identities are not revealed to the Plaintiff prior to litigation.

24 37. Under the notice system, when the Plaintiff's expert identifies an infringing IP Address,
25 it dispatches an email notice to the ISP associated with that IP Address, and the ISP then
26 forwards that email notice to the individual Internet subscriber, notifying him/her of the
27 infringement and the risk of possible litigation.
28

1 38. In each of the cases brought on behalf of the Plaintiff, where the infringement occurred
2 on or after September 1, 2016, the subscriber would have received at least one email warning in
3 advance of the Plaintiff filing suit.

4 39. Attached hereto as Exhibits "A" through "AM" are the various Court Orders, pleadings
5 and related documents cited in the foregoing response, which are not readily available on Lexis
6 Nexis, Westlaw, Fastcase or any official reporter.

7 40. I am informed and believe that the attached exhibits are true and accurate copies of the
8 orders, pleadings and other papers as filed with their respective electronic filing systems and as
9 available on the Pacer system.

10 41. Further affiant sayeth naught.

11 Dated this 27th day of June, 2017.

12 /s/ Charles C. Rainey
13 CHARLES C. RAINEY, ESQ./MBA/LL.M.
14 Nevada Bar No. 10723
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HAMRICK & EVANS LLP